No. 2603

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

PACIFIC POWER COMPANY (a Corporation),
Plaintiff in Error,

vs.

P. R. SHEAFF,
Defendant in Error.

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT OF THE STATE OF NEVADA.

BRIEF FOR DEFENDANT IN ERROR.

B. F. CURLER,
Attorney for Defendant in Error.

No. 2603.

United States Court of Appeals,

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BRIEF OF DEFENDANT IN ERROR

In his Brief, Counsel for Plaintiff in Error has urged and alleged as grounds for the reversal of the judgment in the District Court, eleven specifications of error, the first of which specifications contains *only* nineteen subdivisions.

These specifications he has not discussed seriatim but has divided his argument into five general heads as follows:

FIRST. The complaint does not state a cause of action.

SECOND. The evidence fails to prove the material allegations of the complaint.

THIRD. The Defendant in Error was guilty of contributory negligence.

FOURTH. The Defendant in Error assumed the risk.

FIFTH. The Court erred in refusing to give certain instructions requested on the part of the Plaintiff in Error.

We will attempt in the limited time given us to discuss these propositions in their order.

I.

DOES THE COMPLAINT STATE A CAUSE OF ACTION?

The first point made by Counsel for Plaintiff In Error is that the complaint fails to state a cause of action. In this connection Counsel for Plaintiff in Error has set up a straw man, and then proceeded to knock him to pieces, bit by bit.

He has assumed that the cause of action of the Defendant in Error, if any he has, is that of putting an inexperienced employee at dangerous work without giving him sufficient instruction or warning, and then proceeds to argue that the complaint does not state that the Defendant in Error was an inexperienced workman. That it does not state that his inexperience and ignorance of the dangers attending the work was known to the Plaintiff in Error. And that it fails to allege that the employee was set to work without instruction or warning of the danger of his employment.

A cause of action against the Plaintiff in Error based upon that theory of the case could have been pleaded and was established by an overwhelming preponderance of the evidence. But because that appears in the evidence, the De-

fendant in Error is not restricted to that cause of action alone. The complaint in substance alleges that the Plaintiff in Error constructed a lightning arrester in a defective manner in that it unnecessarily, carelessly and negligently placed the arms of the lightning arrester in too close proximity to the ground and to the wall of the sub-station building. That the so placing of the live arms of the lightning arrester rendered the place unnecessarily and unusually dangerous for *any* person who might go, or be required to go in the discharge of his duty in the vicinity of this lightning arrester. That the so placing of the lightning arrester created not an ordinary risk of the employment of the Defendant in Error but an extraordinary, an unusual risk and an unnecessary danger. That the unnecessary and extraordinary danger created by the method of this construction was unknown to Defendant in Error and could not be known to a person of the knowledge, experience and understanding of the Defendant in Error. That in the discharge of his duty he came in such close proximity to one of the arms of the arrester, charged with a dangerous amount of electricity, and that he received the injuries of which he complains, the results of which injuries are set forth in the complaint.

There is no more familiar principle in the law than the statement that it is the duty of the employer to furnish his employee a safe place to work.

The statement of the law, which is peculiarly applicable in this case does not mean, nor does counsel claim it to mean that a place must be absolutely safe, because in some employments that is an impossibility. What is meant by the statement is that when the employer has used all reasonable

care and diligence, or as stated by some of the Courts, when he has used such care and diligence as a prudent man under like circumstances would have used, he has fulfilled his duty and has furnished a place which is safe within the meaning of the law. It is hardly necessary to cite authorities in support of this proposition but Counsel calls the Court's attention to the following authorities:

Lewis vs. *Seifert,* 116 Pa. 628.
Nadau vs. *Lumber Co.,* 76 Wis. 120.
Portance vs. *Lehigh C. Co.,* 101 Wis. 574.
Elledge vs. *R. R. Co.,* 100 Cal. 289; 34 Pac. 720.
Coombs vs. *Cordage Co.,* 102 Mass. 572.
Kirkpatrick vs. *R. R.,* 79 N. Y. 245.
Union Pac. Ry. Co. vs. *Jarvi,* 69 Fed 65.
Western Coal Min. Co. vs. *Ingram,* 70 Fed. 217.
Railroad Co. vs. *Braugh,* 149 U. S. 368.
Mather vs. *Rillston,* 156 U. S. 391.

It is true that the word "safe" as used in these decisions, and they are too numerous to mention, does not mean a place so made and guarded as to exclude all possibility of danger. It is also true that many employments are in and of themselves dangerous, and it is said in the case of *Martin* vs. *Des Moines Edison Light Company,,* 106 N. W. at page 361,

> "that it involves no paradox to say that a place of danger may be safe in the proper sense of the word, *but*

it is safe only when all safeguards and precautions which ordinary experience, prudence and foresight would suggest have been taken to prevent injury to the employee while he is performing the service which he undertakes to perform."

The proposition of law means that it is the duty of the master not to expose the servant to any injury which may be reasonably anticipated and guarded against.

This is a positive duty and non-delegable. This applies to places where the servant is expected to work and the instrumentalities furnished by the master for the performance of the work. The servant takes upon himself only the risks necessarily incident to the employment, and even then he will not be held to have assumed the risk where the danger is latent and known to the master but not known to, nor by the use of proper diligence discoverable by the servant. It is said in the case last referred to and numerous other authorities cited in that case, and is clearly the law, that

> "in no case does he (the servant) take on himself risks that arise by reason of neglect on the part of the master unless they are known to him or by the use of proper diligence are discoverable by him."

There is another proposition of law, or possibly more properly speaking, a proposition involved in this statement of the law, which is applicable here, and the proposition is that where the danger is great, the duty of the employer is commensurate with that danger.

As applied to electrical cases, in the last case cited it has been said at page 365,

"it is sufficient for us to say that the widely extended use of electricity generally is a development of very recent years and the law has not yet become fully settled as to the duties, liabilities and remedies in reference thereto. It seems, however, that so far as expressed there is substantial unity in the holding that where one undertakes to produce or deal with a power of such tremendous potency so concealed from ordinary observation, so laden with death dealing possibilities and as yet imperfectly understood and controlled, reasonable care for the protection of those who may rightfully come within the zone of danger requires at his hands, the highest degree of prudence and watchfulness proportioned to the magnitude and subtlety of the peril to be guarded against,"

and in this connection the following authorities are cited:

Barto vs. *Telephone Company,* 126 Ia. 244.
Scott vs. *Iowa Tel. Co.,* 126 Ia. 527.
Herbert vs. *Lake Charles Co.,* 35 So. 731.
Mitchell vs. *Raleigh Elec. Co.,* 129 S. C. 166.
McLaughlin vs. *Louisville Elec. Co.,* 37 S. W. 851.
Croswell on Electricity, Sec. 234.
Brown vs. *Edison Co.,* 90 Md. 400.
Keasby on Electric Wires, Sec. 245.
City R. R. Co. vs. *Conery,* 61 Ark. 381.
Cook vs. *Wilmington,* 9 Houst (Del) 306.
Ahern vs. *Oregon Tel Co.,* 24 Ore. 276.
Wolsper vs. *L. L. & P. Co.,* 86 N. Y. Sup. 845.

Under all ordinary circumstances the question of how well this duty has been performed is for the jury. *Martin* vs. *Des Moines Edison Light Company, supra.*

Applying this principle to the case at bar, can it be said

as a matter of law, that the Plaintiff in Error was not guilty of negligence in the construction of the lightning arrester from which the Defendant in Error received the injuries complained of. The lightning arrester was constructed so that the arms next to the sub-station were connected with wires charged with 55,000 volts of electricity. They were constructed within five feet, nine inches of the ground and within three and one-half feet of the Fairview sub-station. According to the expert testimony, the amount of electricity that could be drawn from one of these arms to the ground was 33,000 volts. When we consider that under certain circumstances 110 volts of electricity will kill a man, that 500 volts will usually kill, and that 1700 volts is the amount of electricity used by the authorities in the State of New York in the execution of criminals, the fact that the Plaintiff in Error placed within the reach of any person who might go near that lightning arrester and placed within the reach of the employees of the Plaintiff in error that amount of electricity when the elevation of these arms but a few feet as was done at the Wonder station would have made the structure reasonably safe, shocks the sense of all just men and amounts not only to negligence in the law, but as one of the witnesses characterized it, "criminal negligence."

It may be said that the Plaintiff in Error did not know that Sheaff would come in contact with the live arm of the arrester but that can be no excuse in this case for the law is well settled that it was the duty of the Plaintiff in Error to anticipate such a contingency.

In the case of *Colusa Parrot Mining and Smelting Com-*

pany vs. *Monohan,* 162 Fed. page 276, this Court expressed the true principles governing a situation such as this in the following language:

> "In the present case it appears as has been said, the plaintiff was a common laborer knowing nothing of electrical work and unfamiliar with the perils attending it. In sending him upon the roof to work, the defendant was bound to know that he might come in contact with its wire." (Citing authorities.)
>
> "And it was bound by the plainest principles of law and justice to properly insulate its wire to the end that those likely to come in contact with it should not be injured." (Citing authorities.)
>
> "There is nothing in the suggestion that the defendant's negligence was not the proximate cause of the plaintiff's injury."

The proximate cause, as said by the Supreme Court in *Ins. Co.* vs. *Boone,* 95 U. S. 130, 24 Law Ed. 395, is an efficient cause.

Applying these principles to the case at bar, it follows, that when the Plaintiff in Error constructed its lightning arrester within five feet, nine inches of the ground, it must be held to have been bound to know that any person called upon to work in the vicinity of that lightning arrester was likely to come in contact with one of the horns of the lightning arrester. If the employee was unacquainted with, and ignorant of the danger attending the use of electricity and did not know that the horn was charged with electricity, he was liable to come in such close proximity to the horn as to

receive a shock if his work called him to go past that horn; if he were an experienced electrician, familiar with the danger attending electrical work, if he knew that the horn of the lightning arrester was connected with the high tension power line still by inadvertence or in a moment of forgetfulness caused by the exigencies of his present work, he might come in contact with that horn, or in such close proximity to it as to receive a shock. While a person having the knowledge of an electrician might not be able to recover at law because of his knowledge, and because he elected to continue in the employment, knowing the danger attending the construction, still that would not make the structure less dangerous nor make it a safe place to work. If the employee was not entitled to recover it would be because he assumed not the ordinary risks of his employment, but assumed the extraordinary risks as well. The true principle underlying the law that it is the duty of the employer to furnish a reasonably safe place to work rests upon the doctrine that he must use ordinary care to prevent his employees being injured. Still applying the language of the case last cited, to the present discussion, it is the law, that the Plaintiff in Error was bound by the plainest principles of law and justice to elevate the live horns of the arrester so that its employees were not likely to come in contact with them.

It is urged in the brief of Counsel for Plaintiff in Error, that the complaint fails to state that the Defendant in Error was unfamiliar with and ignorant of the dangers of working near and around this arrester. True, that is not the exact language in which Counsel couches his argument, but that is

the idea. We contend that that is not the proper construction to be placed upon the complaint, but even if it were, that would not render the complaint demurrable upon the ground that it did not state facts sufficient to constitute a cause of action. The risks assumed by an employee is the ordinary risk attending his employment. This principle rests upon contract. The master contracts to use all reasonable care, to furnish the employee with a reasonably safe place in which to work, and reasonably safe appliances with which to perform that work. The servant assumes all of the ordinary dangers attending that employment. The master though he furnish reasonably safe appliances cannot escape liability, if the work is dangerous and he knows that the employee is inexperienced and unfamiliar with the work, and ignorant of the dangers attending the same and does not properly instruct or warn the servant. Upon the other hand the servant may be held to have assumed the risk, even though the place were not a safe place in which to work, or the instrumentalities furnished him were not safe, as the law defines that term. Tho the risk was an extraordinary one,still if the servant appreciated the danger and knew the master was negligent, but elected to proceed with the work, he would then be held, in law, to have assumed such extraordinary risks. The ordinary risks which a servant always assumes are the risks attending the doing of a certain work where the master has fulfilled his duty, by furnishing a reasonably safe place in which to work and reasonably safe appliances. That defense need not be pleaded, but the defense of assumption of extraordinary risks must always be plead, and proved by the master, by a fair preponderance of

the evidence. Therefore, if the complaint alleges that the master negligently and carelessly constructed and maintained a lightning arrester in a defective condition, and the defects are set forth with sufficient paticularity; that these defects created an unsafe place in which to work and that by reason of these defects the servant was injured, the complaint has stated a cause of action. The defenses thereto may be several; the master may deny any negligence; he may also confess and avoid; he may admit that he was careless and negligent, and avoid by alleging and proving that the servant knew that his carelessness and negligence created an unusual and unreasonable risk and extraordinary danger, but that the servant with full knowledge of the risk and danger elected to remain in his employ. This is the affirmative defense of assumption of risk. Without taking the time in this brief to discuss the attempted plea of assumption of risk, because that discussion is rendered unnecessary by the verdict of the jury, still we suggest that the defendant has not pleaded assumption of risk; he may also defend by a plea of contributory negligence. That is also a plea in the nature of confession and avoidance. It admits that the employer was negligent, but by way of avoidance says, so was the employee, and the negligence of the employee was the proximate cause of the injury or proximately contributed thereto. Again without taking the time to discuss the pleadings of the answer of the Plaintiff in Error, it is suggested that the Plaintiff in Error has not pleaded in this case contributory negligence, for no facts are set forth by the defendant sufficient to constitute that defense. In sup-

port of these propositions, however, we cite the following authorities:

Birsch vs. *Citizens Electric Company*, 93 Pac. 920.
Longere vs. *Big Black Foot Mill Co.*, 99 Pac. 132.
Kenney vs. *Kennedy*, 99 Pac. 384.
Konig vs. *N. C. O. Ry.*, 36 Nev. 181.

As part of the strawman which counsel for the Plaintiff in Error is proceeding to knock to pieces bit by bit, Counsel says: The Defendant in Error was an experienced man and that the complaint alleges in substance that an experienced man, to-wit, an electrician's helper, was ordered to work near and around electrical wires; and then proceeds to state that "that would ordinarily be the place where an electrician's helper would work;" and the first thing such an employee would learn is the danger of coming in contact with electrical wires." He then draws the conclusion that no duty was therefore owed to the Defendant in Error.

Counsel completely overlooks the allegations of the complaint and he also overlooks the principals of law applicable to demurrers.

By demurring to the complaint he confesses for the sake of the demurrer, all of the allegations of the complaint which are properly pleaded. He confesses that the Defendant in Error was unfamiliar with the work of a journeyman lineman, and was unacquainted with and ignorant of the dangers incident to the work of a journeyman lineman and electrician, upon or near wires or apparatus carrying electrical current of high voltage and potential energy. He ad-

mits that by reason of the construction, the place was a dangerous place in which to work. He admits that said dangers and dangerous conditions were wholly unknown to the Defendant in Error; and that Defendant in Error was ignorant of the same.

Without conceding that it was necessary to allege in the complaint that the Defendant in Error was unfamiliar with the work of a journeyman lineman and electrician, and also unacquainted with and ignorant of the dangers incident to the work of a journeyman lineman and electrician upon or near wires or apparatus carrying electrical currents of high voltage, still we insist that the admission of that fact by the Plaintiff in Error destroys completely the force of his argument.

The effect of this contention of counsel is that the Court, as a matter of law, will take judicial notice that the place in which an electricians helper would ordinarily be called upon to work would be near and around electrical wires; and that the first thing he would learn would be the danger of coming in contact with electrical wires. This certainly is not a matter of which the Court will take judicial cognizance.

It is difficult to understand what Counsel means by the expression "electrical wires." If he means wires which are intended at some future time to carry electrical currents, then that can be admitted, altho the evidence in his case does not bear out that contention. But if he means by the use of the words "electrical wires," wires charged with a high and dangerous amount of electrical current, we challenge his

conclusion. If the injury had occurred by reason of the fact that the Defendant in Error was injured in moving a transformer, or if the injury was occasioned by a wire which the Defendant in Error was assisting to place on a pole or something of that nature, then the position of Counsel might find support, not in a demurrer, but in the evidence in the case. Neither is his contention that the first thing an electrician's helper should learn is the danger of coming in contact with electrical wires, if he means the danger of coming in contact with wires charged with a dangerous amount of electrical current. If the Court can take judicial knowledge of these matters, it will take knowledge of the fact that the work of installing electrical apparatus is divided among certain workmen, that a common laborer or an electrician's helper is never expected to work upon, nor does he contract to work upon or around wires charged with electricity. That part of the work is performed by journeyman linemen and electricians. It will also take knowledge of the further fact, which by the way appears in the evidence, that no person, be he a journeyman lineman or electrician is expected to or contracts to work around a wire charged with a voltage in excess of 2,500 volts, and indeed it is legal negligence for an employer to require an employee of any knowledge or capacity to work upon or around a wire charged with a voltage as great as 2,500 volts. Counsel insists that the Plaintiff in Error owed no duty, other than to provide for *all* his employees a reasonably safe place to work; that proposition we concede, if it is limited to those employees who are required to go into the place for work, but it is foolishness to assert that an employee engaged to perform service in Lundy,

California, where the electrical current was generated, could recover, if he went to Fairview, Nevada, outside of the scope of his employment, and voluntarily went in close proximity to this lightning arrester, and thereby received an injury. The place would have been as dangerous to him if he had the same knowledge, as it was to the Defendant in Error. But if the master owed no duty to the employee from Lundy, California, he could not recover.

Counsel next discusses the proposition of open, obvious and patent dangers and again asks the Court, tho he has confessed in his demurrer, that the Defendant in Error was ignorant of the dangers and dangerous conditions surrounding the place where he was ordered to work, to take judicial knowledge that this danger was open, obvious and patent; this the court certainly can not do. As was observed by the lower Court in the decision on motion for a new trial, Page 33 of the transcript, "Cases of this kind differ from those which have been cited where the danger was open and apparent to one in the exercise of his ordinary senses. A live wire, or a live pipe, such as we have in this case is not like an opening in a floor, or a rapidly revolving wheel, which people may see and avoid. A live wire is quite as innocent in appearance as a dead one, it gives no warning before it delivers the fatal shock."

This observation of the Court is a true statement of the facts concerning electrical arms, and if the Court will take judicial notice of anything in this case, it will take judicial notice of the fact that the danger created by an electrical wire is not obvious or apparent, by the exercise of the senses

but as was said in the case of *Martin vs. Des Moines Edison Light Co.*, 106 N. W. at Page 365, and in the numerous cases cited therein, is a danger that is concealed from ordinary observation, is so laden with death-dealing possibilities and so imperfectly understood and controlled, that reasonable care for the protection of those who may likely come within the zone of danger requires at the hands of a master, a degree of prudence and watchfulness proportioned to the magnitude and subtlety of the peril to be guarded against.

By parenthesis permit us in this connection to observe, that the illustration of counsel with respect to his rattle snakes is unfortunate indeed, because if the Court is dipping into judicial knowledge, it will take cognizance of the fact that the reptile who, according to Biblical History, tempted Eve to eat of the apple of *knowledge*, always gives warning before it delivers the fatal shock, and permit us to further observe that if the observations of Counsel for the Plaintiff in Error can have any force or effect they are and must be addressed to the defense of contributory negligence alone, and must rest in the proof and not in the pleadings.

Counsel next insists that it is not shown in the complaint how the Defendant in Error happened to come into close proximity to, or in contact with the wire, from which he received his injuries; again by parenthesis permit us to observe that the complaint does not allege that he came in close proximity to or in contact with a wire, and the evidence in the case does not show that he came in close proximity to a wire. What is alleged is that he came in such close proximity to or in contact with one of the arms of the light-

ning arrester and the evidence shows that this arm was a galvanized iron pipe. But the mistake which Counsel makes is that he is asking the Defendant in Error to plead matters of evidence and not the ultimate fact, and we are convinced that had we plead evidentiary matters and not the ultimate fact, the astute gentleman, representing the Plaintiff in Error, would rake us over the coals for so pleading, as he is now attempting so to do for not pleading evidentiary facts, but possibly with better success.

The cases cited by Counsel in support of his different propositions are not applicable to the case at bar, but permit us to say that if Counsel can get any comfort out of the United States Supreme Court decision which he cites, *Washington, etc.*, vs. *McDad*, 135 U. S. 569, he is entitled to that consolation; if we read the case aright, it is decidedly against Counsel, for it lays down in unequivocal language the principle that individuals and corporations are bound to use all reasonable care and prudence for the safety of those in their service, by providing them with machinery reasonably safe and suitable for the use of the latter, and if the master fails in this duty of precaution and care, he is responsible for the injury thru the defect of machinery which is known or ought to have been known to him and is unknown to the employee or servant; and many of the other cases cited by counsel are just as unfortunate for him as the one above referred to.

Counsel in his brief makes the statement more than once that the alleged negligence in placing the live arms of the arrester too near the ground and in too close proximity to

the transformer station was a mere condition. What idea he intends to convey by that statement is more than we are able to determine. Every unsafe place creates a *condition* and it is the condition of the place which makes it safe or unsafe and if the master in violation of his duty to the servant creates a *condition* which makes a place unsafe, he is liable under "the plainest principals of law and justice," for any injury the servant may sustain by reason of the *condition* so created.

Answering the next paragraph of counsel's brief we think it sufficient to say that if we were to concede that the work of a common laborer or electrician's helper was in itself essentially dangerous, which confession we do not make, still, if it were dangerous work the master had no right in law or justice by the construction of its apparatus, to unreasonably increase the danger and hazard, but upon the other hand, the very fact that the work was dangerous required that the master should use all reasonable means commensurate with the danger incurred in making it as safe a place as possible in which to work.

Counsel's fifth point is that no facts are alleged in the complaint showing a casual connection between the alleged negligence and the injury, and then proceeds to discuss paragraph six of the complaint; that paragraph is a description of the injuries and burns received by the Defendant in Error, caused by the passing of the electrical current through him to the ground. Those were simply the results. The casual connection is shown by the allegations of negligent construction which created an unsafe place to work, and the al-

legations which show that the Defendant in Error was injured by coming in such close proximity to or in contact with the live arm of the lightning arrester, carelessly and negligently placed by the Defendant in Error. Had the Plaintiff in Error used reasonable care for the safety of its employees by elevating the live arm of the lightning arrester a few feet further from the ground, or had he as is observed by the trial Court on motion for a new trial, built a board fence from the frame of the arrester to the corner of the sub-station building, this injury would and could not have been received by the Defendant in Error. The dangerous construction, and the sending of the Defendant in Error to work at the place where he was injured was the efficient cause of the injuries and in the law was the proximate cause of the injuries. That point is effectively disposed of by this Court in the statement found in the case of *Colusa Parrot Mining and Smelting Co.* vs. *Monohan,* 162 Federal at page 280, in the following language:

> "There is nothing in the suggestion that the defendant's negligence was not the proximate cause of the Plaintiff's injury. The proximate cause as said by the Supreme Court in *Insurance Co.* vs. *Boone,* 95 U. S. 130, is the efficient cause.

See Also *Konig* vs. *N. C. O. Ry.*, 36 Nev. at pages 211-12-13 and 14.

The citations made by Counsel for Plaintiff in Error under this phase of his argument are entirely inapplicable to the case at bar. Of the ten cases Counsel cites, only three of the cases cited were decided upon the pleadings, four of the cases are cases in which the recovery sought was denied on

the ground that the negligence complained of was negligence of a fellow workman. Three of the cases are cases growing out of the defense of contributory negligence and have no reference whatever to the matter of pleading. The case of *Prokop* vs. *Gulf, etc.*, 79 S. W. page 101, Counsel for Defendant in Error will reserve for oral discussion, but sufficient to say that the facts alleged in that case and in the case of *Smith* vs. *Butner* are not applicable to the case at bar.

The sixth point made by Counsel for Plaintiff in Error is

> "that it is impossible to determine from the complaint whether the employee came in contact with the live wire or not, likewise it cannot be determined whether he received his injury from coming into close proximity to the wire."

Counsel then proceeds to argue that certainty is one of the main requirements in pleading a cause of action, and that it was highly important that the Plaintiff in Error should know whether it was claimed that the Defendant in Error received his injuries from coming in close proximity to the wire, or by coming in contact with it. In support of this proposition Counsel urges that no person of average intelligence would be permitted to say that he did not know of the danger of coming into actual contact with a live wire, but confesses that the rule is different where actual contact is not relied on, but where it is claimed that the electricity jumped from the wire to the body of the Plaintiff. For this reason he asserts that the complaint should have been certain in its averment in this regard. He then makes the statement that there is no evidence as to whether the Plain-

tiff received his injuries by contact or otherwise. We will reserve the matter of evidence with respect to this feature of the case for discussion under its proper head.

As to the matter of pleading, it is sufficient to say that the phase of the demurrer Counsel is discussing, is that the complaint does not state a cause of action, not that the complaint is ambiguous or uncertain upon the question as to whether Defendant in Error received his injuries from coming in contact with the live wire or from electricty jumping from a live wire to his person.

It will be observed that Counsel for Plaintiff in Error interposed a demurrer upon the ground of ambiguity and uncertainty, but did not make this phase of the pleadings one of the grounds of his demurrer. If we were to concede that the complaint was uncertain in this particular, the law clearly is that the Defendant waived that uncertainty by not demurring thereto on that ground. If the complaint was otherwise sufficient, that allegation could be proved upon the trial by showing either that the injury was received by coming in contact with the wire, or by showing that the injury was received by the electricity jumping from the wire to the person of the Defendant in Error.

We admit that there is a distinction made by some cases, none of which, however, have been cited by Counsel for Plaintiff in Error in the brief furnished us, between the liability of the master, created by the servant coming into contact with the live wire, and the liability created by the servant having received his injury from electricity, which jumped from the live wire to him. By way of parenthis,

however, permit us to remark that the distinction is not the one made by the Counsel for Plaintiff in Error but refers alone to the proposition of contributory negligence.

In arguing this phase of the case, Counsel has assumed as a matter of fact that Sheaff, the Defendant in Error, knew that that wire was a wire charged with a high voltage of electricty, and then proceeds to argue that if he came in contact with it, he will not be heard to say that he did not know of the danger of coming in contact with the live wire.

As has been previously pointed out, the instrumentality from which Sheaff received his injury was not a wire. It had none of the characteristics usually associated with the carrying of electricity. It was a galvanized iron pipe bent somewhat in the shape of the letter "L," and the evidence is undisputed that Sheaff did not know that that pipe was charged with electricity. We will discuss this phase later on under the head of evidence.

The objection to the complaint covered by the sixth subdivision of the first article of Plaintiff in Error's Brief, is not an objection that could be addressed to the sufficiency of the complaint, but an objection, if any, that should have been taken advantage of by way of demurrer for uncertainty.

II.

DOES THE EVIDENCE PROVE THE MATERIAL AL LEGATIONS OF THE COMPLAINT?

Before entering upon the discussion of this phase of the case, it is well for us to observe that the Statutes of the State of Nevada, the State in which the injury occurred and

in which this case was tried, provides that "all questions of negligence and contributory negligence shall be for the jury." Revised Statutes, Sec. 5651, and the Federal Judiciary Act provides "that the laws of the several states, except where the Constitution, Treaties or Statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at law in Courts of the United States in cases where they apply." U. S. Revised Statutes, Sec. 721, Judiciary Act. Sec 34, 1 Stat. at L. 92.

The jury having found by its verdict that the Plaintiff in Error was guilty of negligence in the construction of the lightning arrester in question, and that its method of construction created an unsafe place in which to work and was guilty of negligence in sending Defendant in Error to work in an unsafe place;that Defendant in Error was not guilty of contributory negligence and did not assume the risk, that, in our opinion, is an end of this case unless errors of law occurred upon the trial sufficient to reverse the case.

However, out of an abundance of caution, we will call the Court's attention to the salient points of the evidence in the case.

It appears from the evidence that the Defendant in Error was employed by the Plaintiff in Error on or about the 10th day of April, 1911. He was employed as a common laborer to dig holes and help in general with the construction of a spur electrical line running from the main line of Plaintiff in Error to the Fairview mines in Fairview, Nevada.

The first work assigned Defendant in Error was that of gathering together some insulators and other material and

assisting in preparing the same for shipment from Hawthorne, Nevada, to Fallon, Nevada. He was then engaged in digging holes and assisting in setting poles intended to carry the wires from the main line to the sub-station at Fairview. Because of his magnificent physique and superior strength he was later assigned to the duty of "bull-ringing" or "bucking" a telephone wire from the reel-wagon, carrying the wire used in the construction of the electrical line and telephone line, which telephone line was being constructed parallel with and about thirty feet from the power line. This work consisted in pulling the telephone wire, as it came from the reel, across the intervening space between the poles intended to carry the power line and the poles intended to carry the telephone line. He afterwards assisted in laying the wires and tying them to the insulators. When the work of construction was completed, he was assigned the duty of assisting Mr. Halpenny, the electrician in charge of the construction of installing the apparatus in the sub-stations at Fairview and Wonder, Nevada. His first work in that respect consisted in shifting, by the use of rollers and pinch-bars, large transformers to the place where Mr. Halpenny directed. During this time no electricity was coming over the wires of the Plaintiff in Error. Subsequently he assisted Mr. Halpenny in drying out these transformers. In this work electrical current was used. This work was performed under the direct supervision of the electrician and consisted of throwing a switch, disconnecting the electricity from the coils used in drying out the transformers, examining a thermometer suspended inside of the transformers to

determine the heat therein, and again throwing the switch when required, to connect the current of electricity with the coils. There is evidence also in the case to show that he assisted in soldering and taping joints, the tape being used for insulating the joints made in the wires inside of the transformer house. The evidence shows that at the time this work was being done no electricity or electrical current was passing through or over its wires or into the sub-station. Subsequently, at the request of Mr. Halpenny, he constructed a line from the power station at Wonder to the mill at Wonder. His work there consisted in digging holes, setting the poles and stringing the wires. No power was passing over this line while he worked upon it. The connections of this line with the power line going out of the sub-station at Wonder were all made by Mr. Halpenny. The evidence shows that he assisted Mr. Halpenny in constructing a lightning arrester at Wonder, Nevada, which lightning arrester was similar in design to the one at Fairview, where he received his injuries, but differed in this respect that it was erected to one side of the power line, and the horns of the arrester, both live and dead, were elevated some three or four feet higher than were the horns of the lightning arrester constructed at Fairview. The evidence further discloses that at the time he worked on the arrester at Wonder, Nevada, it was not connected with the high power line, and that the connections which were afterwards made, were made by Mr. Halpenny. The evidence further shows, without contradiction, that the Defendant in Error was unfamiliar with electricity and unacquainted with and ignorant of the dangers attending the working around or in

the vicinity of live wires. That is the testimony of the Plaitiff himself, and Sheaff further testified that Mr. Halpenny, in the conversations that he had with him, never made any explanations to him respecting electricity, or how it worked, or what, if any, were the dangers attending it. These are admitted facts in the case, because Mr. Halpenny was upon the witness stand as a witness for the Plaintiff in Error and failed to deny a single statement of the Plaintiff with respect to these matters. The evidence further shows that the Defendant in Error did not participate in the construction of the lightning arrester, on which he was injured, further than in carrying some of the materials to the place and in helping bore some of the holes in the frame upon which the lightning arrester was constructed, and that he was absent when the lightning arrester was erected and when it was attached to the power line.

He further testified that he understood that this apparatus was intended only for the purpose of carrying off lightning which might strike the line, and that if he had seen that the live arms, which by the way, consisted of iron pipe, were connected with the high power line, he would not have known that it was dangerous to come into contact with one of these arms. This testimony is absolutely uncontradicted, and if it had not been the truth, Mr. Halpenny was in a position to have contradicted the Defendant in Error, if he had ever made any explanation to the Defendant in Error which would have furnished him directly or indirectly with this or any other knowledge respecting electricity, he was in a position to have denied, if not the direct testimony of Sheaff, the inferences to be drawn therefrom, but in this connec-

tion permit us to call the attention of the court to the fact that the truth of the statements by the Defendant in Error are corroborated by the testimony of Mr. Halpenny, and the ignorance of the Defendant in Error of the danger attending the coming in contact with a wire charged with electricity clearly appears in Mr. Halpenny's testimony, for Mr. Halpenny in an attempt to show that he had warned Sheaff, testified that on several occasions when they were working in the sub-station at Wonder and at Fairview, he repeatedly said to Sheaff, when he saw him going toward a live wire, "Look out, Sheaff, that wire is hot, or that wire is alive." See transcript, page 451, folio 479 and 480, and Transcript, page 481, Folio 558 and 559. This testimony not only corroborates Sheaff's statement of his ignorance, but also is the strongest possible evidence that the Company's representative actually knew and appreciated that the Defendant in Error was inexperienced and insensible and ignorant of the danger of coming in contact with a live wire.

The evidence discloses that the lightning arrester at Fairview, Nevada, was constructed by Mr. Greenleaf, Mr. Halpenny, Mr. Lee Campbell, Mr. Herring, and a carpenter; that Mr. Greenleaf was the Plaintiff in Error's superintendent of construction, that Mr. Halpenny was the electrician in charge of construction and that Mr. Campbell and Herring were journeyman linemen and electrical workers. That the live arms of the lightning arrester were constructed five feet nine inches from the ground. That when the structure was completed Mr. Campbell remarked to and in the presence of the agents of the Company that it was criminal neg-

ligence to construct a lightning arrester of that kind with the arms in such close proximity to the ground. And the testimony of the Defendant in Error's witnesses, who are not employees now of the Company and who had no interest in this case, was to the effect that both Mr. Greenleaf, superintendent of construction, and Mr. Halpenny, the electrician in charge of construction, admitted that the structure was unecessarily dangerous, and Mr. Greenleaf, according to the testimony of these disinterested witnesses, expressed the expectation that some one would be injured by the arrester, but he and Mr. Halpenny laid the blame therefor on Mr. Poole, their superior officer.

The testimony of Prof. Scrugham, the expert witness for the Defendant in Error, was to the effect that the construction was exceedingly dangerous, not the usual and customary construction, not the usual and customary height, that in the usual construction the live arms of the arrester are put at least nine or ten feet from the ground, and that they are put that high for the purpose of safety. That the danger was occasioned by reason of the fact that the live ends of the arrester were too near the ground, and that the structure would have been a safe structure only if the arms had been elevated at least nine or ten feet from the ground. That under normal conditions the electricity would jump an inch and three-quarters to a person from a line carying 32,000 to 33,000 volts, and under abnormal conditions it might jump three or four inches, and he testified by abnormal conditions he meant a voltage higher than normal between the line and the ground.

(Pages 294, 295, and 296, folio 79, 80, 82, 83.)

Mr. Campbell, with many years experience as an electrical worker and journeyman lineman, testified that the usual construction was to place the live arms of the arrester from seven to twelve feet from the ground, and he had never before seen a lightning arrester of this character constructed so that the live ends of the lightning arrester were as close to the ground as this one. (Pages 256, 258, 259, fols. 405, 410, and 411.)

True, there is testimony on the part of the officers of the Plaintiff in Error, the very persons who were directly responsible for the construction of the lightning arrester, that the lightning arrester was safer as it was constructed than it would have been had the live arms been placed at a greater elevation.

The most that can be said with reference to this testimony is that it created a conflict in the evidence, as to whether the place was a safe place to work. The jury having determined that question adversely to the Plaintiff in Error, that is an end of the controversy, but it may be observed that that testimony so violated every consideration of reason that had the jury accepted it and acted upon it, the verdict so rendered would have been a travesty in the law.

The evidence further discloses that at the time Mr. Halpenny, Mr. Greenleaf, Mr. Campbell and Mr. Herring left Fairview, Nevada, the lightning arrester was not complete. That in order to complete the lightning arrester, it was necessary to place in the ground under the dead arms of the lightning arrester cement blocks to which one end of the

dead arms of the lightning arrester were to be fastened and to the other end of which the ground wire was to be connected. The digging of the holes, the preparation of the blocks by placing the clamps on either end and the placing of the blocks in the ground under the dead arms of the lightning arrester was the work which the Plaintiff in Error directed Sheaff to perform. (Page 164, 165, fol. 178, 180.)

The evidence further discloses that on the morning of the 18th of July on the order of Mr. Halpenny, the electrician in charge of the construction, Sheaff proceeded from Wonder to Fairview to do this work. That he went to Fairview, ordered the clamps made as directed by Mr. Halpenny, proceeded to the sub-station, obtained a pick and shovel, passed around the south side of the sub-station building, took down two wires of the fence enclosing the lightning arrester and the switch and went directly to the south horn of the lightning arrester and dug a hole under that horn. He then proceeded to the next horn, that being the middle horn and closest to the switch. After digging the hole under that horn, he went to the north horn of the lightning arrester and dug a hole under that horn. After completing that hole, he started to go and get one of the cement blocks to place in the hole. The block was on the side of the building. He intended, according to the evidence, to go past the lightning arrester on the north side and between the live horns of the lightning arrester and the sub-station building in order to get the block. When he arrived at a point just opposite the end of the live horn of the lightning arrester on the north side and just before he reached the sub-station building, he

received the shock which resulted in the injuries complained of. (Page 110, 111, fol. 29, 30, 31, 32, 33.)

The evidence discloses that at least 33,000 volts of electricity passed through his body to the ground. The evidence further discloses that the arms of this arrester were constructed of one quarter-inch iron pipe with a coupling on the end. The coupling was about three-sixteenths of an inch thick and made the size of the pipe three-sixteenths of an inch larger in diameter than the main portion of the pipe.

The evidence discloses that Sheaff received a discharge of electricity from the end of the pipe on which there was this coupling, for when the pipe was examined there was found on the coupling covering the end of the pipe a small spot about twice the size of the point of a lead pencil. That spot was found on the outer and lower side of the coupling. The electricians who examined it said it was a spot from which an arc had been drawn, and beneath that spot was found upon the ground, marks which indicated that a man had fallen at that point. That is the point where Sheaff testified that he was lying when he regained consciousness after having received the shock. (Fol. 166, also P. 395, 396, 397, fols. 339, 330, 333.) From that point Sheaff crawled along the side of the building, around the three horns of the lightning arrester and outside of the enclosure at the point where he entered. This fact is significant upon the question as to whether that was a safe construction and whether the construction rendered the place a safe place to work because in passing between the building and the lightning arrester upon his knees, Sheaff did not and could not receive a shock.

Had the live arms of the lightning arrester been elevated even seven feet from the ground, a man of the heighth of Sheaff, which the evidence discloses was six feet 6 and 3-16 inches tall, could not possibly have received a discharge from the live end of the lightning arrester in going to the point where Sheaff was injured. (Fol. 32.)

The evidence further discloses that the ground from where Defendant in Error dug the last hole to within a few feet of the gap in the enclosure made by Sheaff in taking down the wires to go in to work, around the side of the arrester between the arrester and the switch was rocky, precipitous and contained obstructions such as the piles of dirt taken out of the holes, loose rocks and earth and a guy wire running from about five feet high on the switch poles to the ground beneath the frame supporting the lightning arrester. (Fol. 29.)

The evidence further shows that the way in which Sheaff was going was ground level from within a few feet from the hole last dug by him, and smooth and had no obstructions from a point within a few feet from the hole to where the blocks he was after were lying. The direction taken by Sheaff was the direction any person ignorant of the dangers created by the construction of the lightning arrester would naturally take. (Pages 108 and 109, fols. 25, 26, 27, 28.)

The evidence establishes without contradiction, in fact Counsel for the Plaintiff in Error admits, that the live arm of the lightning arrester from which the Defendant in Error received the discharge of electricity was five feet nine inches from the ground.

(Fol. 386.) The coupling on the end of the pipe would reduce that somewhat, possibly three-thirty seconds of an inch. The bubble on the coupling indicating the place where the arc was drawn, however, was not upon the lowest point on the coupling but a little to the outer side from the center. Mr. Sheaff was measured in the shoes which he had on the day of the accident, which shoes, by the way, had not been worn since the day of the accident until he put them on for measurement. He was measured by the man in charge of the Bertillon measurements in the office of the State Police. The measurements showed that the highest point on the right side of the Defendant in Error where he received the discharge of electricity was five feet six and 7/8 inches from the ground. The highest point on his body where he received the discharge of electricity was five feet seven inches from the ground. That point was on the left shoulder near his neck. (Pages 381, 382, 383, fols. 305, 306, 309.)

The evidence shows without contradiction that Sheaff never stopped while he was going to get the block but was walking along in the ordinary way when he received the discharge of electricity. It is a physical fact, which we think the Court will take judicial knowledge of, that the shoulders of a person walking in the ordinary way do not rise and fall with his steps but that the leaning position of a man walking which would have the tendency to lower his shoulders is compensated for by the rise he makes on the foot resting upon the ground. This being so, it was an impossibility for Mr. Sheaff to have come in actual contact with the live horn of the arrester. The closest point that his body could have been to the arrester was an inch and seven-eighths from the

arm of the lightning arrester and presumably he was a greater distance than that from the live arm when he received the discharge. This apparent conflict with the evidence of Prof. Scrugham is accounted for by the fact that possibly and probably at the instant of the discharge of electricity there was a slight surge on the line and that the voltage between the live arm of the arrester and the ground was in excess of 32,000 or 33,000 volts at the instant Sheaff attempted to pass the arm of the arrester. The significant fact shown by this testimony is that Sheaff did not come in contact with the arm but only in such close proximity to the arm as to receive therefrom the discharge of electricity, so that Counsel's argument based upon contributory negligence, in Sheaff coming in contact with the live arm is absolutely destroyed by the evidence in the case. If it were the law, which we do not by any means admit, that the mere fact that Sheaff came in contact with the live arm would charge him with contributory negligence, still in view of what actually occurred, he cannot be charged with contributory negligence upon the score of having come in direct contact with the arm of the arrester charged with a dangerous amount of electricity.

The evidence then clearly demonstrates that the construction was dangerous; that the master did not use ordinary care in the construction of the lightning arrester; that the horns of the lightning arrester were not elevated the usual or customary distance from the ground; that the Plaintiff in Error knew that the lightning arrester was a dangerous contrivance; that the construction made the place where

Sheaff was ordered to work a dangerous place; that Plaintiff in Error knew that it was a dangerous place; that Sheaff was ignorant of the danger and that he received the injuries when in the discharge of his duty and when in the exercise of ordinary care. Thus the evidence supports all of the material allegations of the complaint.

In his Brief Counsel for the Plaintiff in Error insists most strenuously that the Defendant in Error was an experienced man and in his purported Statement of Facts set forth in great detail what he claims was his experience.

If we were to admit the truth of the entire statement of Counsel, we insist that it is not the province of the Court to draw from those facts as a conclusion of law the inferences Counsel seeks to have drawn, but that the question as to whether the Defendant in Error was so experienced as to have charged him with the assumption of risk or with contributory negligence was a question for the jury to determine from the entire evidence in the case and by its general verdict having determined that question adversely to the contention of the Plaintiff in Error, the Appelate Court ought not to reverse the judgment. Before the Appellate Court is justified in reversing the judgment on that ground it has to find as a matter of law that there was no evidence whatever in support of the verdict.

Hayden vs. *Ogden Savings Bank,* 158 Fed. 90.
Omaha Water Co. vs. *Schamel,* 147 Fed. 504.
Glenn vs. *Sumner,* 132 U. S. 157.
Herencia vs. *Gusman,* 219 U. S. 44.
Duke vs. *St. Louis & S. F. R. Co.,* 172 Fed. 684.

Etna Idemnity Co., vs. *J. R. Crowe, Coal Min. Co.*, 154 Fed. 546.

Boatmen's Bk. vs. *Tower Bro. Co.*, 108 Fed. 806.

Counsel for Defendant in Error, however, challenges the accuracy of the Statement of Facts made by Counsel for Plaintiff in Error.The chief objection to the purported Statement of Facts made by Counsel for Plaintiff in Error is that he has taken isolated statements appearing in the evidence without showing their connections. To illustrate the point, Counsel is making, he calls the Court's attention to the statement found on page 11 of the Brief of Counsel for Plaintiff in Error as follows:

> "He knew that there was such a thing as a cold wire —a dead wire—and he knew that there was such a thing as a live wire. He knew that a live wire was one carrying a current of electricty, and a dead wire was one not carrying a current of electricty. (fol. 108.) He knew there was electricity going through the lines to Tonopah, and he knew that it was being generated in large quantities for power and light. He also worked for the Desert Power & Mill Company in 1908, 1909, and part of 1910. It was part of the old Esmeralda Power plant. He worked there as *foreman* in the power house (fols. 109-110). While working there he was brought into connection with electrical generators or motors. They had two or three motors that ran pumps there."

Now let us compare that statement with the whole of the evidence as shown by the record. The Court, out of its experience, will know that this testimony was given in answer to questions propounded by an astute Counsel, and the

transcript is made up of his questions and the witnesses answers thereto,, and does not always convey the same impression as do the questions and answers, but however that may be. Note the underscoring of the word "foreman" about the middle of the page.

The transcript is as follows:

"After working eight months in that power plant I could not tell the difference between a hot wire and a cold wire. I don't think that I knew that a hot wire was one charged with electricity and a cold wire was one that wasn't. How could I tell the difference between a wire that was carrying electricity and a wire that was not? I knew that there was such a thing as a live wire. I knew a live wire was one carrying a current of electricity and I knew that a dead wire was one not carrying a current of electricity. I didn't know that electricity at high voltage was carried through that power plant, how high it was carried. I didn't know anything about what voltage it was carrying. I knew that there was electricity going through the line, going into Tonopah, and I knew it was being generated in large quantities for the use of power and light. I worked also with the Desert Power and Mill Company. I worked with the Desert Power and Mill Company in the years 1908 and 1909 and a part of 1910. The Desert Power and Mill Company was in Millers, Nevada. It was part of the old Esmeralda power plant, and the remaining part, I suppose was the Tonopah Mining Company's mill. I worked part of that time as foreman in a power house. *They were not making any electricty there in those years. The engines were all shut down and the place was in disuse.* While working for the Desert

> Power and Mill Company, I was brought into connection with electric generators or motors. We had two or three motors that ran pumps there." (fol. 108, 109 and 110..)

One of the ideas sought to be conveyed by Counsel for Plaintiff in Error was that the Defendant in Error in 1908 and 1909 and a part of 1910 was working in the capacity of "*Foreman of a power plant*" "and also that he was operating a generator." The whole of the testimony taken together shows the fallacy of the idea sought to be conveyed. What the evidence does show is that in 1908 and 1909 and a part of 1910, he was working in what had once been the power house of the Esmeralda power plant. That he was working as *foreman* but at that time they were not generating any electricity there. The engines were all shut down and the place was in disuse as a generating plant. True, he said while working there he was brought in connection with electrical generators or motors.

The subsequent testimony shows, that he was not brought in connection with a generator. The word "generator" was a misuse of the term. What he was brought in connection with was motors, which were being used to pump water, and they were operated by simply throwing a switch, or, in his language, a lever. (fols. 109, 110, 111 and 112..)

The simple act of throwing a lever to connect the electricity with or to disconnect the electricity from the motor is the sum and substance of the experience that Sheaff had with electricity there. It is from that experience that Counsel asserts that Sheaff was an experienced man. If Coun-

sel's conclusions are sound, every person who turns on a switch to an electric light, or every woman who presses the button which connects the electricity with the motor of her sewing machine, her washing machine or vacuum cleaner or other electrical appliance, must be held to be acquainted with and sensible of the dangers attending working around electricity, a conclusion too absurd to need refutation.

Again we call the Court's attention, simply by way of illustration, to the Statement of Facts at page 13, under the head of folio 130 and 139. Take for instance the statement, "In 1908 they had a little steam engine that ran the generators to operate a crane." The idea sought to be conveyed is that the Defendant in Error ran the generator to operate the crane. The testimony is as follows. Speaking of the year 1907,

> "I had to run the steam engine and had to handle the levers in order to operate the derrick. I had entire charge of that work, so far as running it. They did not have any electrical appliances there in 1907. They did in 1908. In 1908 they had a little steam engine that ran a generator to operate this motor on this crane. The electrician had charge of that steam engine and that generator. I didn't do any work on that. I didn't do any work at all around that steam engine or around that generator. I don't remember how the wires were carried from the generator to the motor. I don't think I ever knew. I was not present while the electrician was setting up the machinery there." (fols. 130 and 131.)

Now passing to the statement under the citation of Folio 139.

"He was running the power line from the main line to the Pacific Power Company's station at Fairview."

The statement found in Folio 139 is:

"I was running this line from the main line to the Pacific Power Company's sub-station."

That is an isolated statement found in the record, as given it conveys an entirely false impression, which false impression Counsel for Plaintiff in Error must have been aware of. The testimony of Sheaff at several other places, and the testimony of Lee Campbell and Clifton Herring, is to the effect that Sheaff was not running the line to the sub-station at Fairview, but that he was engaged upon that line simply in the capacity of a common laborer. His first work on that line was digging post holes and assisting in setting the poles in these holes. The next work was "bullringing or bucking" a telephone wire from the reelwagon to the telephone poles. He afterwards was taught how to use a pair of climbers and assisted other men in laying the wires and tying them to the insulators, but the wires were not connected with any electrical current whatever. That was work that any common laborer, if young, vigorous and spry, after being shown how, could do in a short time as well as an electrician. These are the principal things which show that Sheaff had knowledge of the operation of electricity and the terrible dangers attending its use.

If Counsel for Defendant in Error were to stop to point out all of the false inferences Counsel for Plaintiff in Error seeks to convey to the Court by his Statement of Facts, this Brief would be so extended that Counsel could not prepare

it in the five days given him to prepare and have printed his Brief. Suffice it to say that Counsel challenges the accuracy of practically every proposition made in the purported Statement of Facts as being an effort to create a false view of what the evidence in this case shows.

III.

ASSUMPTION OF RISK

We admit that the Defendant in Error will be held to have assumed the ordinary risks of his employment but not the extraordinary risks. The proposition is clearly stated in the last edition of Labatt on Master and Servant, Vol. 3, Section 894, as follows:

> "A proposition which has so frequently been enunciated by the Courts as to have become axiomatic is that, *prima facie*, a servant does not assume any risks which may be obviated by the exercise of reasonable care on the master's part. In other words, the abnormal, unusual or extraordinary risks which the servant does not assume as being incident to the work undertaken by him are those which would not have existed if the master had fulfilled his contractual duties."

At Section 902, the author says:

> "There is no exception to the rule that the violation by the master himself of any of the duties enumerated in the foregoing sections constitutes a cause of action in favor of a servant who is injured thereby. A *prima facie* right to indemnity exists, therefore, whether the master's culpability was, under the doctrine prevailing in the jurisdiction where the accident occurred, one ap-

pertaining to the performance of a duty belonging to the non-delegable class, or a mere detail of the work."

The question whether a risk is ordinary is a question of fact primarily for the jury.

Labatt on Master and Servant, Sec. 1169, last paragraph.

"A principle which has been formulated and applied so frequently as to have become axiomatic is that a servant is *prima facie* not chargeable with an assumption of extraordinary risks—risks, that is to say, which may be obviated by the exercise of reasonable care on the master's part."

Labatt on Master and Servant, Sec. 1178.

Reduced then to a working basis the principles are thoroughly established, first, that the servant assumes the ordinary risks of his employment. These risks which are incident to the employment, when the master has discharged his full duty in furnishing the servant with a safe place in which to work and with safe appliances with which to do his work, that for the purpose of a *prima facie* case, the servant does not assume the extraordinary risks, risks which may be obviated by the exercise of reasonable care on the master's part. If the evidence on the part of Plaintiff established the fact that the master has been negligent in constructing an appliance, and that appliance created an unsafe place to work, and that the servant was assigned to work in that place and was injured while working, the servant has made a *prima facie* case, entitling him to have the case submitted to the jury.

The defendant may defend on the ground of assumption

of risk, but in order to make that defense he must allege and prove by a preponderance of the evidence that the servant assumed the extraordinary risk. In order to charge the servant with having assumed an extraordinary risk, created by the negligence of the master, it is necessary to show in the defense that the extraordinary risk created by the master's negligence was known to and comprehended by the servant, and where the servant is chargeable with neither actual nor constructive knowledge and comprehension of the risk he will not be held to have assumed it.

The question as to whether Sheaff had actual knowledge of the extraordinary risk created by the placing of the live arms of the arrester within five feet nine inches of the ground and three and one-half feet of the wall of the substation building was a question for the jury. Even if he can be held to have known that the live arms of the lightning arrester were charged with electricity, then the next fact to be proven by the Plaintiff in Error, by a preponderance of the evidence, was that Sheaff comprehended and appreciated the danger of coming in close proximity to the lightning arrester.

As to whether he did so appreciate and comprehend the danger was a question for the jury, and having been decided adversely to the Plaintiff in Error by the general verdict, is conclusive upon the question of assumption of risk.

Labatt on Master and Servant, Sec. 1179 and cases cited under that section.

IV.

CONTRIBUTORY NEGLIGENCE

The real defense to this action, if the Plaintiff in Error had one, which we do not concede, was the defense of contributory negligence. That defense, like the affirmative defense of assumption of risk, must be pleaded and proved by a preponderance of the evidence.

See authorities cited under heading, "Does the complaint state a cause of action?"

In order to establish a defense of contributory negligence in this case, it was necessary for the Plaintiff in Error to establish by a fair preponderance of the evidence that Sheaff knew or ought to have known of the material conditions which rendered the act done by him in attempting to pass around the lightning arrester an imprudent act.

In discussing this proposition, Labatt in his work on Master and Servant at Sec. 1233, lays down this principle:

> "It is manifest that a servant can not be deemed to have been in fault for the reason that he failed to take precautions which he did not know to be necessary for his safety. Hence his action will not be barred on the ground that he was guilty of contributory negligence in respect to the act which was the immediate cause of his injury, unless it is shown that he knew, or ought to have known, of the material condiitons which rendered the act, so done, an imprudent one * * * Obviously, if his excusable ignorance of those conditions is a proper inference from the facts in evidence, he cannot be declared, as a matter of law, to have been guilty of

contributory negligence. Under these circumstances it is unnecessary for a Court to pursue the inquiry into the second stage, by considering whether he comprehended the danger to which the conditions exposed him." Citing authorities.

At Sec. 1234, the same author announces the rule as follows:

> "In cases where the servant's knowledge of the condition is not disputed, or is so apparent that a jury cannot be permitted to declare that he did not know of them, the essential question is whether he also comprehended the danger to which these conditions would subject him, if he pursued a certain course of conduct. Whenever the evidence is not such as to justify a Court in saying that only an affirmative answer can be rendered to this question, it is for the jury to determine the quality of his act."

As applicable to this phase of the question and also upon the question of sufficiency of the complaint, we call the Court's attention to the case of *Devore* vs. *St. Louis and S. F. R. Co.*, 86 Mo. App. 429.

Mr. Labatt lays down the further principle under Sec. 1244 of his work at page 3400:

> "Contributory negligence being, as we have seen, predicable only where the servant understood the conditions and the resulting dangers, the case is always for the jury if it is not a necessary deduction from the evidence that he did understand those conditions and those dangers."

Counsel for Plaintiff in Error urges with great insistence that because Sheaff took a way which turned out to be dangerous, and which we admit was actually dangerous, where there was another way presumably safe, he is responsible for his own injury and cannot recover in this action. As we have heretofore pointed out the way from the last hole dug by Sheaff, which Counsel insists was a perfectly safe way, was steep, over uneven ground and ground that was covered with loose earth, rock and other obstructions, a difficult way to travel over. The way Sheaf took when going to get one of the cement blocks to put in the hole, was over ground level and smooth for almost the entire distance he would have to go. This matter is entirely a phase of contributory negligence, and comes directly under the principles announced by Mr. Labatt in the three or four sections last quoted. Where there are two ways, presumably safe, a servant cannot be charged with negligence in taking one of these ways which turns out to be dangerous, he being ignorant of the dangers. See

Lauter vs. *Duckworth,* 48 N. E. 864.
McElligott vs. *Randolph,* 61 Conn. 157, 29 Am. St. Rep. 181.
Norfolk vs. *W. R. Co.* vs. *Cheatwood,* 48 S. E. 489.

In order to charge Sheaff with contributory negligence he must have had knowledge of the danger. Contributory negligence cannot be laid at his door for the sole reason that it happened that he took the dangerous one.

Payne vs. *Oakland Traction Co.,* 15 Cal. App. 127.

In the case of *Ambry* vs. *Postal Telegraph Cable Co.,* 86

N. E. 871, the Court held that an instruction upon the fact of the servant's choice of a more dangerous of two ways of performing his work was erroneous because it omitted the element of the servant's knowledge of the greater danger of the way chosen, and Labatt in his work on Master and Servant, under Sec. 1249 at page 3436, states the rule of law as follows:

> "It obviously results from the broad principle referred to in Sec. 1234 (ante) that the inability of a servant to recover on the ground that he adopted the less safe method of doing work, can be predicated only in cases where he not only had constructive knowledge, not merely of the material conditions with which he had to deal, but also comprehended the comparative safety of the various courses open to him."

In the case of *Tennessee Coal, I. & R. Co.* vs. *Herndon,* 100 Ala. 451, 14 So. 287, the Court lays down the principle:

> "The fact that an employee was injured because of the manner selected of doing his work, when if he had selected another way the injury would have been avoided, does not of itself fix upon him contributory negligence, since the result is not the true test; but the test is whether he knew the way selected to be dangerous, or the danger was apparent or obvious."

In discussing the question of assumption of risk and contributory negligence Counsel for Plaintiff in Error in speaking of the decision of the Court denying defendant's motion for an instructed verdict says, at page 82 of his Brief:

> "The District Court held that from Sheaff's act in attaching a plum line to the dead arms, the jury may infer

inexperience or ignorance of danger. The Court's point was that if a surge had occurred even the dead arms would be dangerous. But the Court evidently did not have in mind the fact upon which all the experts agreed, that even under those circumstances there would be no danger from the dead arms. The current would pass to the ground through the ground wire—the line of least resistance. Even during a surge the dead arms could have been handled without injury. Of this Sheaff was probably aware."

There is nothing in the evidence, conceding that the statement of Counsel is correct, to indicate that Sheaff was probably aware of this, or had any knowledge whatever on the point, in fact it is apparent from Sheaff's testimony and conduct that he did not know the exact purpose of the arrester or the principal upon which it worked. All that the testimony shows is his statement that he understood that it was to protect the line from lightning and that it was not expected to work except when there was lightning on the line. However, Counsel's statement that all the experts agreed that even in case there was a surge on the line there would be no danger from the dead arm is not correct, for Professor Scrugham testified that if the dead ends of the lightning arrester were connected, as shown upon this construction, and the ground wire passed along a trench of the building, and passed out over a ground wire, and into a shaft, if a person came in contact with the dead arm of that arrester, or in contact with the ground wire, and a surge occurred upon the line sufficient to form an arc between the live and dead sides of the lightning arrester, the result would be that a person would probably be severely injured, but it would de-

pend upon the efficiency of the ground. That it is very difficult to obtain a thorough ground in this location. In explanation of that testimony he said:

> "We have two paths for the current to go to the ground; one is through the ground wire, one is through the man's body. If there is any obstruction or impedence to the passage of the current to the ground wire; that is, any appreciable obstruction, it would depend on the efficiency of the ground; a portion of that will take the path through the man's body, probably injuring him severely, even killing him." (Pages 297 and 298, fol. 87 and 88.)

So it appears that Counsel was entirely mistaken as to the fact that all of the experts agreed that there would be no danger from the dead arms in case of a surge on the line sufficient to cause the electricity to arc from the live to the dead side of the lightning arrester. So the observation of the Court that inferences of Sheaff's inexperience and ignorance can be drawn from the act of attaching a plumb line to the dead arm of the lightning arrester is correct and well warranted, for no person other than one ignorant of the dangers would take chances of that kind with a current of 55,000 volts.

Much stress is laid by Counsel in his Brief upon the fact that this lightning arrester was enclosed and that there were danger signs on the door of the sub-station and the posts of the switch. From this fact he draws the conclusion that Sheaff was charged with knowledge that the lightning arrester was dangerous and that in passing by the live arm of the lightning arrester Sheaff did not use any care at all.

and that it is apparent from this that he must have wandered, without thinking, to a point within an inch and three-quarters of the north arm of the lightning arrester.

Let us consider for a moment the character of the enclosure. It was a wire fence, built of three or four strands of wire. The wire was either barbed wire or telephone wire. See transcript, pages 326 and 395, fols. 158 and 338.

What was there about the character of this fence to indicate to any one that the lightning arrester was a dangerous appliance and that there was any danger in coming in contct with it? All that could be inferred from this fence by the most careful man was that it was an enclosure put up for the purpose of keeping domestic animals away from appliance, for the purpose of protecting the appliance from the animals, not for the purpose of protecting the animals from the appliance. The fence was no obstruction to a man or child. It would make it but slightly more difficult for a man or child to pass through than if there was no fence there at all. The character was not such as to prevent men or children from going inside that inclosure and the fence as constructed could not be considered as any obstruction whatever to men or children. Had the fence been a high, tight board fence, then the inference Counsel seeks to draw, namely, that a person was charged with notice that the apparatus was dangerous, might be reasonably drawn. But the character of the fence, such as it was, could not be construed as giving notice to anyone that the structure was dangerous, or that it was built to protect anyone from the apparatus therein, but the notice given would be that the

fence was constructed to protect the apparatus from domestic animals. It was the kind of a fence used in that part of the country for the purpose of fencing against domestic animals and for no other purpose whatever.

Now, let us consider the danger signs. Sheaff's testimony upon that count is as follows:

> "I don't remember whether there were any danger signs anywhere in connection with the Wonder sub-station, or not. It seems to me I have some kind of recollection of painting a danger sign myself. I did not under Mr. Halpenny's direction or at his request paint a danger sign at the Fairview sub-station. I think I did at the Wonder sub-station. I can't describe that danger sign; I forget about it, what was on it. I believe I painted it with black paint on a piece of board. I can't say for sure whether I wrote the word 'Danger' on it. I do know this much, however, that I did paint a danger sign and my recollection is that it was at Wonder. I think I nailed it on the switch post at Wonder. I think I nailed that danger sign when I painted it, on the switch post at the Wonder Station. Using this merely for the purpose of illustration now, that would be posted in the neighborhood of these two poles on this outside structure. I posted it there because Mr. Halpenny told me to. That was the only reason that I posted it there, certainly. I thought it was to keep people away from the switch. I thought it was to keep them from monkeying with that switch. I thought it was just to keep them away from the switch so they would not bother it. At any rate, to the best of my recollection I knew the danger sign was up and I made it and put it up myself. I did not see any danger sign on the door of the Wonder

sub-station—I can't remember seeing any. I didn't see any danger sign on the door of the Fairview sub-station. I don't remember seeing any. I won't swear there was not a danger sign on the door of the Fairview sub-station; there may have been, if there was I did not notice it. On the day of my accident I did not see any danger sign in the neighborhood of the switch at the Fairview sub-station. On the morning of my accident, I don't remember seeing a large board in the neighborhood of the switch-board reading something like this, with large letters: 'Danger, high voltage, Keep out.' I don't remember seeing it. I didn't go anywhere near the switch-board. On these tallest upright posts on the structure, farthest away from the sub-station, I did not see a large danger sign there, 'Danger, high voltage, Keep out,' or something of that substance. I didn't look for any around there." (Transcript, pages 186 and 187, fols. 230 to 234.)

Mr. Greenleaf, superintendent of construction of the Plaintiff in Error, testified as follows:

"That lightning arrester was finished before I left there, and the fence that was around it was put up before I left. The wiring, with the exception of the concrete, was complete before I left. This ground that appears on here now was in. I did not place these danger signs myself. Mr. Perrin placed a danger sign on one of the poles of the switch, and on the door of the sub-station. I don't remember exactly what the sign said, because I have put up a good many hundred signs since then, but I do know that the word 'Danger' was on it, and I think 'High Voltage.' * * * I don't know if there was a sign put on the switch; I said I thought I put it on, but I was not sure but that they put

it on; but I am pretty positive that the sign was put on the switch, in fact, I know it. I am absolutely sure the sign was put on that switch and that I saw it there." (See Transcript, page 413, 414 and 422, fols. 378, 379 and 403.)

Mr. Halpenny testified as follows:

"On the nineteenth there was a danger sign on the front door of the sub-station, and as I remember it, one on the switch, fastened to the post. My recollection is that these signs said, 'Danger, high voltage, keep out,' or 'keep away;' they had the initials of the Nevada Hills Mining Company. They were all made from the same tracing; they were blue-print signs, made in the draughting office. It was the ordinary blue-print with white letters. I would say those letters were very plain. I saw them plainly. I don't remember whether the letters were of uniform size or not, but my recollection is that some of the words, either 'Danger' or 'High Voltage'—I believe the word 'Danger' was larger than the rest; and as I remeber it, the letters would be some two and a half inches high. To the best of my memory I would say that the size of the whole sign was twelve by fifteen inches. * * * The next day after the accident there was a danger sign on the switch post at Fairview. I am not sure who put it there. It was a piece of blue-print paper about twelve by eighteen inches." (Transcript, Pages 450, 451 and 481, fols. 478, 479, 558.)

Mr. Greenleaf's testimony, then, was to the effect that that sign contained, as he remembers it, 'Danger, High voltage," and on his direct evidence testified that Perrin placed the danger sign on one of the posts of the switch, but on

cross examination testified that he didn't know if there was a sign on the posts of the switch. Mr. Halpenny testified that on the day succeeding the accident, that is, on the nineteenth, there was a danger sign on the front door of the station, and, as he remembered it, one on the switch fastened to the post; as he remembers it, the sign contained the words, 'Danger, High voltage, Keep out,' or 'Keep away." It will be observed that one of these danger signs was placed on the front door of the sub-station. That was on the opposite side of the building from which the lightning arrester stood. The other danger sign, if there was any other on the day of the accident, was on the switch, was on the switch fastened to the post. The switch was eighteen or twenty feet from the dangerous part of the lightning arrester. From the language of the sign one would conclude that the switch was dangerous, that there was high voltage there, and the admonition was to keep away. Anyone looking at that sign would construe it to refer to the switch, and it is a fact that about the most dangerous thing about a powerplant is, ordinarily, the switch in the high tension lines, which connects or disconnects the electricity passing from these lines to the sub-station. And can it be said as a matter of law that a man of Sheaff's experience seeing a danger sign upon the post or upon the front door of the sub-station building, would be charged with notice that an apparatus on the opposite side from the door of the sub-station and twenty or thirty feet from the switch, which had been marked dangerous, would be charged with notice that the apparatus inside such an enclosure was dangerous. We insist that is not the law. So whether he would be so charged or not is a

matter for the jury to determine from all of the facts and circumstances of the case, and we insist that the existence of the danger signs, if any, at the points to which witnesses have testified, and the character of the enclosure, were not sufficient to appraise Sheaff, or any other person, that the lightning arrester was a dangerous appliance. We insist that these signs did not add anything to the testimony in the case, that they are entirely a negligible quantity

There was nothing in the testimony of this case, which destroyed in the least the effect of Sheaff's testimony that he did not know that the lightning arrester was dangerous, but there is much in the case to support his testimony upon that point. Some of the things that support his testimony are, first, the act of Sheaff in wrapping the twine about the dead arms of the lightning arrester, the very act of Sheaff going in close proximity to the live arms of the lightning arrester. The testimony of Mr. Halpenny that when Sheaff was working in the sub-station at Fairview and Wonder he had to repeatedly inform Sheaff that wires were hot or alive, and the fact that a man who had worked for some time with Sheaff, a thoroughly educated electrician, expressed himself on the morning of Sheaff's accident, and prior thereto, that he ought not to have sent Sheaff to Fairview, but should have gone there himself, and expressed himself after having received knowledge of Sheaff's injury that he felt that morning he should not have sent him over there. (See fols. 720, 721, 722, 724, 725, and 727.)

It is urged by Counsel for Plaintiff in Error that because this last testimony was offered in the form of impeaching

evidence, it cannot be received as substantive proof. We admit that that is the general principle of law but that principle is not applicable here. That testimony is entitled to be considered as proof of Sheaff's ignorance, and as an admission of the Plaintiff in Error's knowledge of his ignorance. The mere form of the question or that it is an effort to impeach a witness, does not destroy its probative force. (Jones on Evidence, Sec. 854.)

And the jury upon such evidence, having held that Sheaff was ignorant of the dangers and dangerous condition created by the construction of the lightning arrester, the verdict based thereon is an end of this question.

V.

DID THE COURT ERR IN REFUSING TO GIVE CERTAIN INSTRUCTIONS REQUESTED ON THE PART OF THE PLAINTIFF IN ERROR?

The Court modified instruction Number 3, by adding thereto this statement:

> "This instruction must be understood with this addition: In determining whether there was negligence in sending Sheaff to work about the arrester, you should consider the situation and conditions, and what the Power Company knew of his experience and familiarity with electricity and electrical arms and appliances, and the dangers thereof."

This was a proper modification of that instruction. The evidence of Sheaff's knowledge and experience was offered by the Plaintiff in Error. They had sought to show by the testimony of Halpenny that he was a thoroughly competent

man; that he was familiar with the dangers incident to the work around a place of this kind. They insisted strenuously in the Court below that he was not ignorant of the dangers, and that by reason of his competency and knowledge, he assumed the extraordinary risks of working around this lightning arrester; that by reason of his knowledge and experience and the warning given him by Halpenny, he was guilty of contributory negligence.

The instruction as offered sought to limit the jury's consideration to one single circumstance in exclusion of all others, as being the infallible evidence of a complex fact dependent upon a number of circumstances and was properly modified.

Reynolds vs. *McArthur*, 2 Pet. U. S. 417, 7 Law Ed. 470.

All the surrounding or attendant circumstances must be taken into account when the question involved is one of negligence.

Diamond State Iron Co vs. *Giles*, 11 Atl. 189.

It is negligence to subject a servant to a risk not ordinarily incident to his employment unless obvious to him, or he be appraised of it in some manner.

Bonnet vs. *Galveston H. & S. A. Ry. Co.*, 33 S. W. 334.

Negligence has always relation to the circumstances in which one is placed and what an ordinary prudent man would do or omit to do in such circumstances.

The fourth assignment of error is that the District Court erred in refusing to instruct the jury as requested by Plaintiff in Error in its certain requested instruction No. 4 A.

This instruction was given in the exact language of the requested instruction and the substance was given in another part of the Court's charge. (See Transcript, fols. 774 and 792.

The effect was modified by the addition of the following words:

> "Save as this admissioin is modified and limited by the allegation that he was unfamiliar with the work of a journeyman lineman and electrician, on or near wires or apparatus carrying electrical current of high voltage, and that said place was a dangerous place in which to work by reason of the fact that the live arms of said lightning arrester were so near the ground and in such close proximity to said sub-station, and that said dangerous conditions were wholly unknown to Plaintiff herein, and Plaintiff was ignorant of the same." And was further explained by a part of the charge found at folio 794.

This was a proper modification and explanation of that instruction. The instruction taken as it was presented, would have limited the jury to the sole consideration of the duties of an electrician's helper and would have eliminated

from their consideration the main question in the case, namely, was the master negligent in the construction of the lightning arrester, and did that construction create an unsafe place in the law; and would have also excluded the question as to whether the dangerous conditions were wholly unknown to the Plaintiff and as to whether he was ignorant of the same. Like the other instruction it sought to limit the jury to one single circumstance in exclusion of all others, and was properly modified by the Court so as to make it applicable to the whole case. (See authorities cited under preceding section, and also see *Virginia Portland Cement Co.* vs. *Lutt,* 49 S. E. 577.)

Did the Court err in refusing to give instruction set forth under Paragraph V of the Brief for Plaintiff in Error?

It was inapplicable to the case at bar. The injury Defendant in Error received was in working around an apparatus carrying electrical current of high voltage and potential energy. As to whether he was ignorant of the dangers of a journeyman lineman or electrician in climbing poles and tying wires on lines carrying no electricity, was immaterial in the case, and besides the complaint not having alleged that Sheaff was employed or working as a journeyman lineman or electrician, an allegation that he was unfamiliar with the duties of a journeyman lineman or electrician upon or near wires or apparatus carrying electrical current of high voltage and potential energy, cannot be considered as an admission that he knew and was acquainted with all of the other

dangers of a journeyman lineman and electrician. But even if the complaint could be construed as an admission that Sheaff was familiar with all of the dangers of a journeyman lineman or electrician except the one from which he received the injury, an injury occurring by reason of the negligence of his employer, that fact would not be material in the case. The instruction could not serve to enlighten the jury or assist them in a proper determination of the case. It could only have the effect of clouding the issue. "A consumation on the part of the Plaintiff in Error devoutly to be wished."

It was certainly not an error on the part of the Court to refuse to give an instruction on a matter that was not in issue and upon which there was no evidence given.

N. Y. & Colo. Mining Syndicate & Co. vs. *Fraser,* 132 U. S. 611.

Did the Court err in refusing instruction set forth under Paragraph VI of the Brief of Plaintiff in Error?

It is true that no expert testified that the placing of the live arms of the lightning arrester three and one-half feet from the substation building was a negligent construction, but it was a physical fact which the jury would be entitled to take into consideration and that the placing of the live arms so close to the sub-station would have the tendency to cause a person attempting to pass around the lightning arrester on that side to come closer to the end of the north horn of the lightning arrester in making the turn, than he would

naturally do if the horns had been placed a greater distance from the building. It was not a correct statement to say that there was no evidence to sustain this charge, because there was the evidence of a condition and the influence of that condition upon an ordinary man, ignorant of the dangers, was a matter which the jury was entitled to consider. It would have been error for the Court to have given that instruction.

It is error to instruct the jury entirely to disregard evidence as to certain defects, although the evidence did not show that the defects contributed to the injuries, the jury being entitled to consider all of the evidence in determining how the accident occurred.

Mitchell vs. *B. & Con. Cop. & S. Min. Co.*, 97 Pac. 1033.

An instruction that would exclude from the jury the consideration of any fact in evidence is erroneous.

Adams & Harding vs. *Roberts*, 2 Howard 486, 11 Law. Ed. 349.

We insist that the jury was entitled to consider the physical conditions which influenced Sheaff in coming in close proximity to the horn of the lightning arrester from which he received the discharge of electricity.

Did the Court err in refusing to give instruction set forth under Paragraph VII of the Brief of Counsel for Plaintiff in Error?

The reason assigned by Counsel why this instruction should have been given was that it clearly states the law and confines the jury to the precise issue made by the pleadings. The Court refused to give this instruction because there was no issue upon this question. In taking his exceptions, the substance of that instruction was stated by Counsel in the presence of the jury. The Court in its general charge had definitely limited the questions to be determined by the jury and in refusing that instruction stated in substance that there was no issue for the jury to consider because it was based upon the amendment which Plaintiff has withdrawn and stated in the presence of the jury that it was entirely out of the case.

The Court cannot be required to instruct the jury upon matters not in issue, neither is it necessary for the Court to tell the jury that certain things are out of the case. It is his province to tell the jury what is in the case and to limit them to the consideration of those matters. That he did, and having done that, the jury were instructed as to the law of the case. It would have been error to submit to the jury an issue which is not warranted by the pleadings and evidence.

Throwegan vs. *King*, 111 U. S. 549.

In the trial of an action for negligence resulting in an injury, the Defendant asked an instruction that the omission of certain acts or duties did not constitute such misconduct as the law would recognize as wanton and willful; such negligence was not alleged in the pleadings or claimed on the trial, and it was held that the refusal of such instructions was proper, there being no such issue in the case.

Lousiville Ry. vs. *Shire,* 108 Ill. 142.

An instruction should not divert the attention of the jury to issues not presented thereby and it is proper to refuse such instructions.

Enc. Pl. & Pr. Vol. 11, page 160 and cases cited, including *Atlas Nat. Bank* vs. *Holm,* 34 U. S. App. 472 (Digest.)

Did the Court err in refusing to give the part of the instructions refused under Paragraph VIII of the Brief of Counsel for Plaintiff in Error?

The part refused is:

> "If an employee is sent to work in a dangerous place, but the dangers, even though great, are open, plain and obvious and such as are or should be known to an adult person of ordinary intelligence and capacity, such place is under the law a reasonably safe place to work."

This part of the instruction was properly refused, because it was inapplicable to this case at bar. And as an attempted to be applied to this case was an incorrect statement of the law. We admit that the word "safe" as applied to a case of this kind does not mean a place so made and guarded as to exclude all possibility of danger. No man of care, prudence and foresight can produce or insure such a condition, but a place which is dangerous can only be safe in the law when all safeguards and precautions which ordi-

nary experience, prudence and foresight would suggest have been taken to prevent injury to an employee while he is performing the work. The error in the part of the instruction refused by the Court eliminated entirely the question as to whether the master used ordinary care, prudence and foresight in constructing the appliance. If he took such precautions as ordinary experience, prudence and foresight would suggest to prevent injury, then the place was a safe place in the law. Counsel confuses the doctrine of "safe place" with the doctrine of contributory negligence. If the master has been negligent in performing his duty to create a reasonably safe place to work, nevertheless, the servant cannot recover if the dangers even though great, were open, plain and obvious and such as would or should be known to a person of ordinary intelligence and capacity, but the reason that he cannot recover is not that the place was a safe place to work but because either he assumed the risk or was guilty of contributory negligence in attempting to work at that place. The observation of the Court was made in response to the exception of Counsel, and was a true proposition in the law. It would have been error for the Court to have instructed the jury as a matter of law that a dangerous place, no matter how unnecessarily dangerous, is a safe place to work if the servant knows and appreciates the dangers. See

Martin vs. *Des Moines Edison Light Company,* 106 N. W. at bottom of page 361 and top of page 362.

The case of *Dunbar* vs. *Hollingsworth, etc. Co.* is inapplicable to this discussion and besides the reasoning in that

case is not philosophical, or supported by the weight of authority.

Did the Court err in refusing to give the instruction set forth in Paragraph IX of the Brief of Plaintiff in Error?

This instruction is in substance the part of the instruction refused by the Court in the instruction last discussed, and it was no error to refuse the same. See

McGovern vs. *C. & R. Co.* 123 N. Y. 280.
George vs. *Clark,* 85 Fed. 608.
B. & O. & C. R. R. Co. vs. *Rowan,* 3 N. E. 627.

Did the Court err in refusing to give the instruction set forth in Paragraph X of Brief of Plaintiff in Error.

This is an instruction upon the facts and was only another way of asking for an instructed verdict. It involved the whole case and if the view taken by the lower Court and contended for in this Brief was correct, the instruction was properly refused. To argue this instruction would be to argue the entire case over again.

COUNSEL'S CONCLUSION

It seems to us that we have seen this illustration before. Oh, yes, as we refresh our memory we find it was contained in Counsel's Brief on motion of a New Trial in this case.

Then, as now, it was the testimony of Lee Campbell that suggested the illustration. Yes, and then as now, it was his expression, "You bet I have heard that purring sound on the transformers frequently. It is a peculiar sound—just like a rattlesnake."

That sound suggested to Lee Campbell a rattlesnake; but who was Lee Campbell? He was a journeyman lineman and electrical worker of over thirty-seven years experience on all kinds of line construction and everything included around electrical appliances. He was the man, who, according to the testimony, said to Greenleaf, the superintendent of construction, and to Halpenny, the electrician in charge of construction at the time the lightning arrester was constructed that it was criminal negligence to leave that arrester with the live ends of the arrester so close to the ground.

Out of the abundance of his experience and knowledge, the sound made by the transformers suggested to him something as deadly as a rattlesnake.

But how about Sheaff? He said the transformers made a humming sound or a kind of a purr. There is nothing in the evidence to indicate that the sound suggested to him other than the hum of a telephone wire caused by the wind; or the innocent purr of a happy and contented kitten. This

illustrates the difference between the knowledge of Campbell and the knowledge of Defendant in Error and is significant upon the question of Sheaff's ignorance.

How about the illustration? Was Sheaff sent to dig holes in a place enclosed by a substantial fence, a fence that would fence out or fence in a nest of rattlesnakes? Was the danger sign which *possibly was upon the pole of the switch,* a sign apprising Sheaff or any other man, that the enclosure he entered was an enclosure filled with something as deadly as rattlesnakes? If the sign was such a one as Counsel would have us believe, did it say "Rattlesnakes within this enclosure" or did it say "Rattlesnakes on this switch?"

Did Sheaff, after digging the holes wander unthinkingly into the thicket, or was he then engaged in the work that he was sent to do, a part of which was to go and get the cement blocks from the side of the building and place them in the holes that he had dug? When he received the discharge of electricity, which made one of the most splendid physical beings Counsel ever saw, a cripple, who is to suffer for the balance of his natural life, did he hear the rattling of the rattlesnakes, or was the apparatus which dealt him the deadly charge as silent as the tomb?

If this illustration of Counsel is to be considered an illustration applicable to the situation, conditions and circumstances as shown by the evidence in this case, all that we can say is "God save the mark!"

We insist that this case shows negligence on the part of the master amounting to criminal negligence.

We insist that the instructions given by the Court were as favorable to Plaintiff in Error as it was entitled to. Nay, more, for if there is any criticism to be made on these instructions it is that they were more favorable to the Plaintiff in Error than it was entitled. That being the situation, then this case ought not to be reversed.

Dated, Elko, Nevada, October 1, 1915,

Respectfully submitted,

B. F. CURLER,

Attorney for Defendant in Error.